IN THE SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

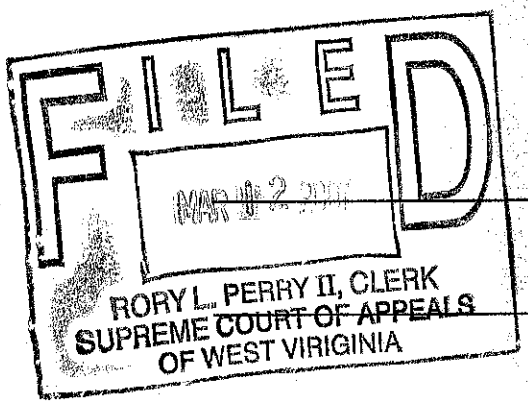
STATE OF WEST VIRGINIA,

Plaintiff Below/Appellee,

vs: **No. 33188**

DAVID NELSON,

Defendant Below/Appellant.



APPELLANT'S REPLY BRIEF

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NOW COMES THE Appellant, David Nelson, and for this his Reply Brief to the Brief of Appellee, State of West Virginia, states as follows:

I.

THE COURT ERRED WHEN IT FAILED TO CONDUCT A HEARING UNDER RULE 404(b) OF THE WEST VIRGINIA RULES OF EVIDENCE AND PERMITTED THE STATE TO USE EVIDENCE CONCERNING ALLEGATIONS THAT THE APPELLANT HAD SEXUALLY ABUSED HIS 13-YEAR-OLD SISTER IN 1987.

The State of West Virginia cleverly argues that the Trial Court was not required to conduct a hearing under Rule 404(b) of the West Virginia Rules of Evidence because the State contends this evidence was rebuttal evidence in response to character testimony presented by the Appellant. However, the facts of the Appellant's case do not sustain the State's argument.

It should be remembered that the Appellant raised the Defense of Alibi at his trial. Furthermore, it is undisputed that the Appellant introduced a photograph of his family indicating that he was married and had two (2) children. The alibi defense was based upon the fact that as a family man he was home watching his children while his wife was at work when this murder was allegedly committed.

Assuming, arguendo, the accuracy of the State's argument that this evidence was character, the State's argument also fails because this evidence of the Appellant sexually abusing his 13-year-old sister allegedly occurred in 1987 when the Appellant was approximately 18

years old. Consequently, the State's evidence of the Appellant allegedly sexually abusing his 13-year-old sister pre-dates his marriage and pre-dates the birth of his two (2) children.

The Appellant once again reminds this Court that even the Circuit Judge in this case felt that the evidence of the Appellant allegedly sexually abusing his 13-year-old sister in 1987 fell under Rule 404(b). (Tr. p. 108, April 15, 2005). Furthermore, the Appellant reminds this Court that the Circuit Court didn't even bother to conduct a hearing under 404(b) to determine whether the admission of this evidence and the probative value thereof outweighed its prejudicial affect upon the jury. Further, the Appellant's contention that he was a family man didn't automatically grant to the State the absolute right to destroy the character of the Appellant. More specifically, alleging that the Appellant was a family man and was at home babysitting his two (2) children when the crime occurred in no way implies that the Appellant is pure in character.

If the Appellant opened the door on the use of character evidence, then what logical nexus is there between the Appellant being a family man in 2002 and allegedly sexually abusing his 13-year-old sister in 1987? It should be remembered that the State was permitted to cross-examine the Appellant with regards to marital difficulty suffered between

the Appellant and his wife. (Tr. pp. 100 & 101, April 15, 2005). The State was also allowed to cross-examine the Appellant about an affair that he had with a LaDonna Hatch. (Tr. pp. 103, 104, 105 & 106, April 15, 2005).

The State's introduction of evidence that the Appellant had allegedly sexually abused his 13-year-old sister in 1987 was not character evidence. However, if this Court believes that character became an issue, then this evidence was too remote to be material to any of the criminal charges.

II.

THE COURT ERRED WHEN IT VIOLATED RULE 801(d)(1)(B) OF THE WEST VIRGINIA RULES OF EVIDENCE BY PERMITTING AN OUT-OF-COURT STATEMENT OF A CO-CONSPIRATOR TO BE USED AGAINST THIS APPELLANT WHEN THE DECLARANT WAS AVAILABLE AND TESTIFIED AT THE TRIAL.

The Appellant reminds this Court that even the Attorney for the State of West Virginia admits in its Brief that the admission of the taped out-of-court statement by Zandell Bryant which was presented to the jury was erroneously admitted. More specifically, the State concedes that the admission of the taped out-of-court statement by Zandell Bryant was an improper admission as a statement against interest in that West Virginia Rule of Evidence 804(b)(3) only allows for such admissions when the declarant is unavailable to testify. Zandell Bryant

took the stand to testify in the State's case in chief the same day that the taped statement was admitted. However, the State simply argues that this error was harmless.

It should be remembered that the Appellant was on trial for his life and any statement that is admitted in error impacts on the jury's decision in this matter. With regards to this type of error, all inferences should be in favor of the Appellant because of the severity of the penalty if he is convicted. Be it remembered that the admission of this out-of-court statement of the co-defendant, Zandell Bryant, permitted the jury to hear evidence which was not otherwise subject to cross examination. Because the Appellant or his attorney was not able to cross-examine this statement, its admission had a devastating impact on the jury. Consequently, the admission of the taped out-of-court statement of the co-defendant, Zandell Bryant, was not a harmless error.

III.

REVERSIBLE ERROR WAS COMMITTED IN THIS CASE AS THE ASSISTANT PROSECUTING ATTORNEY MADE IMPROPER REMARKS DURING OPENING STATEMENTS.

Your Appellant acknowledges that this assignment of error is probably the weakest of the three (3) assignments to which this Honorable Court decided to hear. However, if you take the improper remarks made by the Assistant Prosecuting Attorney during opening

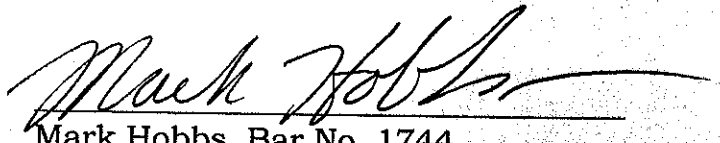
statements and combine them with either of the two (2) assignments of error listed above, then Appellant submits that such errors are more than enough to grant him a new trial. Furthermore, Appellant still hangs his hat on the fact that the remarks were improper and these improper remarks were one of the first comments the jury was able to hear from the State's Attorney. Consequently, the improper remarks interfered with the Appellant's right to a fair and impartial trial.

CONCLUSION

The Appellant, David Nelson, respectfully submits that the Trial Court violated Rule 404(b) of the West Virginia Rules of Evidence and violated Rule 804(b)(3) and 801(d)(1)(B) of the West Virginia Rules of Evidence. Consequently, either of these violations of the West Virginia Rules of Evidence, standing independently, denied your Appellant a fair trial.

David Nelson

By Counsel



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CERTIFICATE OF SERVICE

I, Mark Hobbs, Counsel for Appellant, do hereby certify that a true and accurate copy of the foregoing Appellant's Reply Brief was sent by United States Mail, postage prepaid, to R. Christopher Smith, Assistant Attorney General, Attorney General's Office, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305-0220, on this the 12th day of March, 2007.

Mark Hobbs